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No. 83-1911

IN THE

# Supreme Court of the United States

October Term, 1983

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CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

*Petitioners,*

*vs.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Under the First Amendment, may a court permanently enjoin a publisher from publishing information and opinions about publicly traded securities on the ground that the publisher is not registered under the Investment Advisers Act of 1940?

2. Do the registration provisions of the Investment Advisers Act of 1940, permitting denial or revocation of registration on the ground of prior misconduct, constitute an unconstitutional prior restraint under the First Amendment on the rights of publishers to publish information and opinions about publicly traded securities?

3. Does the exemption in the Investment Advisers Act of 1940 for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" unconstitutionally discriminate under the First Amendment, or under the principles of equal protection of the laws incorporated in the due process clause of the Fifth Amendment, against publishers of non-exempt publications?

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CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

*Petitioners,*

*vs.*

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Christopher L. Lowe, Lowe Publishing Corporation, Lowe Management Corporation and Lowe Stock Chart Service, Inc. respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment and opinion entered in this proceeding on January 18, 1984.

## Opinions Below

The opinion of the court of appeals, by Oakes, J., the concurring opinion, by Van Graafeiland, J., and the dissenting opinion, by Brieant, J., have not yet been reported. They are reproduced at A1, A20, and A23, respectively. The opinion of the United States District Court for the Eastern District of New York, by Weinstein, C.J., is reported at 556 F. Supp. 1359. It is reproduced at A41.

References are to pages of the appendix annexed to the petition.

## Jurisdiction

The judgment of the court of appeals, reversing the judgment of the district court, was entered on January 18, 1984. A timely petition for rehearing, filed by the respondent herein, was denied by the court of appeals on February 22, 1984.

This Court's certiorari jurisdiction is invoked under 28 U.S.C. 1254(1).

## Constitutional Provisions

The First Amendment to the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."



The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any person ... be deprived of life, liberty, or property, without due process of law; ..."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

## Statutory Provisions

The following sections of the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, are reproduced at A68: section 202(a)(11), 15 U.S..C 80b-2(a)(11) (defining "investment adviser"); section 203(a), 15 U.S.C. 80b-3(a) (requiring registration); section 203(c), 15 U.S.C. 80b-3(c) (specifying the procedure for registration); section 203(e), 15 U.S.C. 80b-3(e) (providing for censure, denial, suspension or revocation of registration); section 203(f), 15 U.S.C. 80b-3(f) (providing for sanctions against associates of investment advisers) and section 209(e), 15 U.S.C. 80b-9(e) (providing for injunctions against violations).

## Statement of the Case

### Holding Below

The court of appeals held that petitioners should be permanently enjoined from publishing information and opinions about the value of, or advisability of investing in, publicly traded securities, because petitioners are not registered as investment advisers under the Investment Advisers Act of 1940.

**Petitioners' Publishing Activity**

Petitioners are publishers of investment newsletters. The newsletters primarily contain articles describing various investment markets and market indicators, and economic and political forces affecting those markets. The newsletters also contain factual information and the publishers' opinion about the value and desirability of specific publicly traded securities and other forms of investment.

The newsletters are distributed by mail to subscribers. One newsletter has approximately 5,000 subscribers. Another has approximately 600 subscribers. Distribution has been irregular; one newsletter had two issues in 1981 and five in 1982, and another newsletter had four issues in 1981.

In addition to publishing the newsletters, petitioners maintained a telephone hot line, which consisted solely of tape recorded information similar to the information included in the publications.

Petitioners do not sell or buy, or offer to sell or buy, securities or other investments. They do not have any interest in any of the securities or other investments that they describe or comment on. Petitioners do not render personal advice to individual investors. They do not invest or manage investments on behalf of investors. Petitioners simply publish newsletters.

No allegation is made that any of the investment information published by the petitioners has been false or materially misleading. No allegation is made that the petitioners have profited through ownership of securities referred to in the newsletters.



**The Investment Advisers Act**

The Investment Advisers Act of 1940 (the "Act"), creates a system of mandatory registration for what it defines as "investment advisers." As applied to newsletter publishers, the Act creates a discretionary system of prior restraint.

By its terms, the Act requires, *inter alia,* registration with the Securities and Exchange Commission (the "Commission") as a pre-condition to publishing, for compensation, information or advice about the value of, or advisability of investing in, securities (15 U.S.C. 80b-2(a)(11) and 80b-3(a)) and authorizes the Commission, in its discretion, to deny or revoke such registration for prior misconduct (15 U.S.C. 80b-3(e)).

On May 11, 1981, the Commission, in the exercise of its discretion, revoked the prior registration as an investment adviser of Lowe Management Corporation and ordered that Christopher Lowe be barred from association with any investment adviser. The Commission based its action on petitioner Christopher Lowe's prior misconduct. Specifically, Christopher Lowe was convicted in 1977 and 1978 of two felony and two misdemeanor counts. None of these convictions arose out of petitioners' publishing activities and none was related to the information or opinions expressed in the newsletters.

**The Proceedings Below**

When the petitioners continued their publishing (but no other supposed investment advisory activity), the Commission, on June 6, 1982, filed a complaint against them in

the United States District Court for the Eastern District of New York. The complaint sought to enjoin petitioners from continuing to publish their newsletters and to require them to "disgorge" all monies or proceeds received in connection with their publishing business since May 11, 1981, the date of the Commission's order.

The complaint asserted that petitioners were publishing their newsletters without being registered, in violation of Section 203(a) of the Act, 15 U.S.C. 80b-3(a) (reproduced at A69).

The complaint did not assert that any of the information reported or opinions expressed in petitioners' publications was fraudulent or misleading.

The petitioners' answer, among other things, asserted that the Act was unconstitutionally discriminatory, that it violated petitioners' First Amendment rights of free speech and free press, and that it was facially unconstitutional under the First Amendment.

After a one-day trial before Chief Judge Jack B. Weinstein on September 13, 1982, the district court dismissed the portions of the complaint seeking to enjoin petitioners' publishing activities or seeking "disgorgement."

The district court held that the petitioners' publications constituted pure First Amendment speech. Accordingly, the court held that petitioners' publishing activity could not be subjected to the prior restraint of a registration requirement under which the government had discretion to deny or revoke registration based on past misconduct.



The court further held that even if the publications were assumed to be "commercial speech," the sanction of future prohibition against publication was excessive and would be invalid under the First Amendment. Rather than declare the Act unconstitutional, the court construed the Act so as to delete the Commission's discretion to deny or revoke registration of publishers, except in very limited circumstances.

The court did, however, enjoin petitioners from giving information to subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person. It also denied petitioners' post-judgment motion to permit them to provide a telephone service consisting solely of recorded information without any personal communication.*

The Commission appealed to the Court of Appeals for the Second Circuit from the denial of the relief it had requested. Petitioners appealed from the injunctive portion of the judgment and from the denial of their post-judgment motion.

The court of appeals, in a 2-1 decision, reversed the judgment of the district court. The court of appeals held that petitioners should be prohibited from ". . . selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." (A20). It analogized the Act's licensing require-

* The district court also dismissed additional counts alleging that petitioners violated the antifraud provisions of the Act by failing to disclose Christopher Lowe's convictions to their readers, as well as a count alleging that Christopher Lowe was violating the Commission's order. The court of appeals did not discuss these additional counts.

ments, as applied to publishers, to the licensing of professionals. (A18). Alternatively, it held that petitioners' publications were "potentially deceptive commercial speech" (because of Christopher Lowe's prior criminal record). (A19). The court said, however, that Christopher Lowe would not be prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor or writer. (A20).

The dissenting judge would have affirmed the district court's judgment. The dissenting opinion said that publications such as the petitioners' enjoy full First Amendment protection at least so far as prior restraint is concerned and that they do not constitute commercial speech. (A24, 29). The dissenting judge noted the heavy presumption against the constitutional validity of prior restraints (A31) and said that ". . . the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers." (A34).

## Reasons for Granting the Writ

The court of appeals decision dangerously infringes on freedom of the press. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 559 (1976). Absent compelling circumstances, publishers may not be subjected to a permanent court injunction against future publication. *E.g., New York Times* v. *United States,* 403 U.S. 713 (1971).



The court of appeals, however, imposed a permanent injunction against future publication of truthful information and opinion, notwithstanding the absence of any compelling circumstances, or any clear and present danger, requiring permanent suppression.

Moreover, the court of appeals' upholding of the Act conflicts with numerous cases holding that where the state undertakes to license the exercise of First Amendment rights, it may not deny or revoke a license on the basis of past misconduct, *e.g., Entertainment Concepts, Inc.* v. *Maciejewski,* 631 F.2d 497 (7th Cir. 1980), *cert. den.,* 450 U.S. 919 (1981); *see also, Cornflower Entertainment, Inc.* v. *Salt Lake City Corp.,* 485 F. Supp. 777 (D. Utah 1980) (collecting 23 additional cases). Denying or revoking such a license based on past misconduct results in the complete suppression of material even though such material may be constitutionally protected.

The court of appeals' rationale, that the Act's regulatory scheme as applied to publishers is similar to the mere licensing of professionals, blatantly violates the First Amendment rights of publishers. Congress may not dictate which subjects people may or may not write about. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 784-85 (1978) held that:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

As stated in *Thornhill* v. *Alabama,* 310 U.S. 88, 101 (1940):

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public

concern without previous restraint or fear of subsequent punishment.

This Court's recent decision in *Bose Corp.* v. *Consumers Union,* —— U.S. ——, 52 U.S.L.W. 4513 (1984), indicates that the publication of information and opinions about products offered to the public by others is protected by the First Amendment. In terms of the First Amendment, petitioners' comments about the advisability of buying IBM stock or Chrysler stock are no different from, *e.g., Consumer Reports'* comments about the advisability of buying IBM computers or *Motor Trend*'s comments about the advisability of buying Chrysler cars. All such publications form part of the free flow of information that is indispensable to our free society and all are constitutionally protected against prior restraint.

The court of appeals' alternative ground of decision, that petitioners' publications may be regulated as commercial speech, erroneously extends the commercial speech doctrine to cover pure First Amendment speech. It conflicts with cases of this Court that define commercial speech as "expression related solely to the economic interests of the speaker and its audience," *e.g., Central Hudson Gas* v. *Public Service Commission,* 447 U.S. 557, 561 (1980).

Petitioners' publications are not related solely to such interests and are not commercial speech. Petitioners have no direct or indirect economic interest in the securities they discuss or in whether the reader buys, sells or does nothing. Petitioners' expression relates to the economic interests not of themselves and their readers, but to the economic interests of their readers and third parties buying and selling securities. Nor are petitioners' publications "speech which does no more than propose a commercial transaction." *Virginia State Board* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 762 (1976). Petitioners publish a wide range of financial and market information. Where they do refer to specific securities, they do not propose securities transactions but rather they comment (favorably or unfavorably) on securities that may be proposed for purchase or sale *by others.*



Even if petitioners' publications are classified as commercial speech, the court of appeals failed to follow the analysis required by *Central Hudson.* It failed to show that petitioners' publications are likely to be deceptive. (The Commission has not alleged that any investment information in the publications is deceptive.) And the court failed to show that *complete suppression* of petitioners' speech is no more extensive than necessary to further the state's interest.

Moreover, the court of appeals' upholding of the statutory exclusion for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation," section 202(a)(11)D, 15 U.S.C. 80b-2(a)(11)(D), violates the principle that freedom of the press under the First Amendment is guaranteed to all publications, *cf., Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue,* —— U.S. ——, 51 U.S.L.W. 4315 (1983). As noted in *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938): "The liberty of the press is not confined to newspapers and periodicals."

Under the principles of equal protection, which are incorporated in the due process clause of the Fifth Amendment, *e.g., Davis* v. *Passman*, 442 U.S. 228 (1979),

> [w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.

*Zablocki* v. *Redhail*, 434 U.S. 374, 388 (1978). Nevertheless, the court of appeals upheld the Act's discriminatory classification of non-exempt publications without any showing of sufficiently important state interests or that the classification is closely tailored to effectuate only those interests.

In summary, this Court should review the decision below because the injunction it imposes, and the statutory scheme it validates, dangerously conflict with the First Amendment right of all publishers to publish on any subject of legitimate public interest, free of judicial or legislative prior restraint.

## Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 15, 1984

# APPENDIX

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 106, 173—August Term, 1983

(Argued September 19, 1983 Decided January 18, 1984)

Docket Nos. 83-6108, 83-6116

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff-Appellant-Cross-Appellee,*

—v.—

CHRISTOPHER L. LOWE et al.,

*Defendants-Appellees-Cross-Appellants.*

Before:

OAKES and VAN GRAAFEILAND, *Circuit Judges*,
and BRIEANT, *District Judge.**

Investment adviser whose registration under the Investment Advisers Act of 1940 had been revoked for criminal

* Of the Southern District of New York, sitting by designation.

misconduct held not entitled to continue publishing investment advisory newsletters despite First Amendment. Judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Chief Judge*, reversed.

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JACOB H. STILLMAN, Associate General Counsel, Securities and Exchange Commission, Washington, DC (Daniel L. Goelzer, Alan Rosenblat, David Sirignano, W. Robert Gray, of counsel), *for Appellant-Cross-Appellee*.

MICHAEL E. SCHOEMAN, Schoeman, Marsh, Updike & Welt, New York, NY (Elizabeth H. Cooper, David A. Newberg, of counsel), *for Appellee-Cross-Appellant Lowe*.

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OAKES, *Circuit Judge*:

An investment adviser registered under the Investment Adivsers Act of 1940 was convicted on three different occasions of serious misconduct in connection with his investment advisory business. Pursuant to the Act, the Securities and Exchange Commission revoked his registration because of his convictions. He has nevertheless continuted to publish and sell newsletters containing investment advice, in violation of the Act's requirement of registration. The interesting, if not altogether unique, question presented by this case is whether the publication

of such advice is protected by the First Amendment so as to preclude the SEC from seeking to enjoin its continuance.

## FACTS

Christopher L. Lowe is the president of the three corporate entities involved in this case: Lowe Management Corp., Lowe Publishing Corp., and Lowe Stock Chart Service, Inc. Between March, 1974, and May, 1981, Lowe Management was registered with the SEC as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act, 15 U.S.C. § 80b-3(c) (1976). As such it published investment advice and managed and had custody of the funds of its clients on a discretionary basis.

In 1977, Lowe was convicted of two New York misdemeanors relating to his investment advisory business.[1] He pleaded guilty to making false representations to a client that $2,200 had been invested for his benefit and a 27% return earned, when in fact Lowe had misappropriated the funds for his own use. He also pleaded guilty to failing to register in New York State as an investment adviser.

In 1978 Lowe was convicted of two New York felonies.[2] He pleaded guilty to tampering with physical evidence, involving the alteration of a copy of a $10 money order to have it appear to be for the amount of $10,000. In addition, he pleaded guilty to third degree larceny for fraudulently drawing checks on an account to which

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1 N.Y. Gen. Bus. Law § 352-c (McKinney 1968); N.Y. Gen. Bus. Law § 359-eee (McKinney 1968).

2 N.Y. Penal Law § 215.40 (McKinney 1975); N.Y. Penal Law § 155.30 (McKinney 1975).

worthless checks had been deposited. For these convictions Lowe received a prison sentence and was ordered to make restitution to the client.

As a result of these convictions the SEC instituted administrative proceedings under Section 203 of the Investment Advisers Act, 15 U.S.C. § 80b-3(e) & (f) (1976), against Lowe and Lowe Management. The Commission found that Lowe had aided and abetted willful violations of the antifraud provisions of the Act, violated the reporting provisions of the Act, and failed to amend Lowe Management's investment advisory registration form to report the convictions which related to his conduct as an investment adviser. In assessing sanctions the Commission found that Lowe's conduct "could hardly be more serious[,] . . . reflect[ing] a callous disregard" for the high fiduciary standards required of an investment adviser, and that the criminal conduct "clearly demonstrate[d] his total lack of fitness to remain in 'an occupation which can cause havoc unless engaged in by those with appropriate background standards.'" *In re Lowe Management Corp.*, SEC Investment Advisers Act of 1940 Release No. 759 (May 11, 1981) (quoting *Marketlines, Inc. v. SEC*, 384 F.2d 264, 267 (2d Cir. 1967), *cert. denied*, 397 U.S. 947 (1968)). The Commission rejected the argument that sanctions were unnecessary because Lowe and his advisory corporation no longer handled clients' funds or securities, but only provided investment advice by publication. Noting that even these activities "afford numerous 'opportunities for dishonesty and self-dealing,'" *id.* at 5, the Commission revoked the registration of Lowe Management as an investment adviser and barred Lowe from association with any investment adviser. Lowe did not seek judicial review of the Commission's order.

Lowe's criminal activities did not end here, however. In 1982 he pleaded guilty to two charges under New Jersey law of theft by deception in the third degree,[3] for fraudulently misrepresenting that checks drawn on his personal and one of Lowe Publishing's accounts were good and negotiable. For these activities he was sentenced to a three-year prison term and probation, and ordered to make restitution of over $27,000 to the defrauded banks.

Despite the Commission's order of May 11, 1981, revoking Lowe's registration as an investment adviser and barring him from association with any investment adviser, Lowe has published and distributed two investment advisory services, the *Lowe Investment and Financial Letter* and the *Lowe Stock Advisory*, and solicited subscriptions for a third one, the *Lowe Stock Chart Service*. He is president, research chairman, and editor of all three services, and his corporations, Lowe Management, Lowe Publishing, and Lowe Service were the publishers of the newsletters. In addition, Lowe has offered a recorded telephone "hot-line" service to subscribers of six months or more. Despite these activities, he has not applied to register either himself or any of the corporations as an investment adviser.

The *Lowe Letter* has had from 3,000 to 19,000 clients, with an average of about 5,000. Subscriptions cost $39 for one year or $79 for three years. A typical *Lowe Investment and Financial Letter* gives a short-term and long-term forecast. It offers advice on the relative desirability of investing in, among other things, stocks, Treasury bills, and money market funds, and describes rather generally the state of the market. It recommends particular stocks and groups of stocks for purchase or

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3 N.J. Stat. Ann. § 2C:20-4 (West 1982).

sale, discusses precious metals, and announces special reports and the telephone hot-line service.

The *Lowe Stock Advisory* has only a few hundred subscribers and a number of readers who receive complimentary subscriptions. Subscriptions cost the same as do those to the *Lowe Investment and Financial Letter.* The *Stock Advisory* is typically somewhat more specific, however, with a brief introductory examination of general market trends followed by specific purchase, sale, and hold recommendations, particularly for low-priced stocks. The *Lowe Stock Chart Service* has solicited subscriptions, but has never been published.

No contention is made that any of the information published in the advisory services has been false or materially misleading. Nor is it alleged that Lowe himself, unlike the investment adviser in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), has profited through personal or corporate investments from the investment advice rendered.

## THE DECISION OF THE DISTRICT COURT

The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, believed that the Investment Advisers Act could not be construed to permit the SEC to revoke Lowe's registration as an investment adviser, and thus to bar him from publishing his newsletters, without violating the First Amendment. The court first analyzed the case on the assumption that the Lowe publications constituted commercial speech and thus were not entitled to the full protection of the First Amendment. *See In re R.M.J.*, 455 U.S. 191, 200-01 (1982) (advertising by lawyers). It found, nevertheless, that "the censorship that the SEC

would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public," and amounted to an unconstitutional prior restraint on the basis of "speculative assessments." In reaching this conclusion the court apparently thought that the fact of Lowe's past misconduct was not in itself enough to make his future speech "potentially misleading" and consequently subject to restraint. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980).

The court went on to suggest, however, that the case actually fell "outside the rubric of commercial speech." Although recognizing that the Supreme Court had never explicitly so held, Judge Weinstein stated that commercial speech consisted only of advertising, citing *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1140 (3d Cir.) (citing *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973)), *cert. denied*, 456 U.S. 975 (1982). As a result, he believed that Lowe's newsletters were fully protected by the First Amendment, and that their "combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters . . . raises unanswered questions concerning the conditions, if any, under which an absolute restraint may constitutionally be imposed upon them.

Rather than rule the Act unconstitutional, however, the district court construed the Act's definition of an "investment adviser" so as to avoid possible infringement on freedom of the press. It did so by distinguishing personal or "person-to-person" advice from "impersonal" investment advice given in publications. The court evidently reasoned that "strong sanctions in the way of prior restraints" may be invoked against persons providing

"personal" investment advice since that activity involves "delegations of trust and responsibility," but may not be invoked when the investment advice is provided by publication or writing. Accordingly, the court entered a limited injunction enjoining defendants from rendering personal investment advice "by telepone, individual letter or in person." As to "impersonal" advice, the court believed that disclosure, rather than denial or revocation of registration, was the only constitutionally permissible means of protecting the public.

In effect the court construed the Act so as to deny the SEC the authority to revoke a publisher's registration solely on the basis of past misconduct. Under this interpretation, a person whose registration is otherwise revoked may nevertheless remain registered as an investment adviser for the limited purpose of publishing so long as the publication is done "impersonally." A letter to several people rather than to an individual is thus differentiated. Somewhat inconsistently, perhaps, the district court treated Lowe's recorded hot-line telephone message as rendering "personal" rather than "impersonal" advice.

## DISCUSSION

We do not believe that the Investment Advisers Act may be rewritten as the district court would rewrite it. The Act does not distinguish between "personal" and "impersonal" advice, but rather between publications or writings "as to the value of securities or as to the advisability of investing in, purchasing, or selling securities," on the one hand, and "bona fide newspaper[s], news magazine[s], or business or financial publication[s] of general and regular circulation," on the other. 15 U.S.C. § 80b-2(a)(11) (1976). The SEC quite properly

determined that the Lowe advisory letters and services were the former, and that Lowe and his corporations were "engag[ing] in the business of advising others, either directly or through [such] publications or writings . . . ." *Id.*

The statute specifically grants the SEC the power to revoke the registration of any investment adviser convicted of certain crimes, among these the crimes for which Lowe was convicted. 15 U.S.C. § 80b-3(e)(2). Accordingly, we believe that the SEC was well within its statutory authority when it revoked Lowe's registration. Unlike the district court, we do not believe that this statutory authority violates the First Amendment.

*The Act*

The Investment Advisers Act of 1940 was "the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the Depression of the 1930's." *SEC v. Capital Gains Bureau*, 375 U.S. 180, 186 (1963). The Act was the result of a study undertaken by the SEC at the direction of Congress to investigate "the functions and activities of investment trusts and investment companies . . . ." Section 30 of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79z-4 (1976). The SEC submitted to Congress a memorandum questioning "the good faith of some of the less reputable of these generalized investment services." Hearings on S. 3580 Before a Subcommittee of a Senate Committee on Banking and Currency, 76th Cong., 3d Sess. 47 (1940) at 1008. It emphasized the potential for abuse if persons in the business of publishing investment advice were willing to "lend[] themselves to the use of stock market promoters and manipulators." *Id.* (quoting

*Twentieth Century Fund, Inc., The Security Markets* 692 (1935)).

On the basis of the SEC's report and other information before it, Congress found that investment advisers were "of national concern" and that "their advice, counsel, *publications, writings, analyses, and reports* . . . occur in such volume as substantially to affect interstate commerce, national securities exchanges, and other securities markets, the national banking system and the national economy." Section 201 of the Investment Advisers Act, 15 U.S.C. § 80b-1 (emphasis added). In so finding, Congress hearkened back to Section 17(b) of the Securities Act of 1933, in which it prohibited the publication of any letter or investment service which describes a security without disclosing that the publisher has been compensated for such publicity, and to concerns expressed in the Senate Report accompanying the passage of the Securities Exchange Act of 1934. 15 U.S.C. § 77q(b) (1976) and S. Rep. No. 792, 73d Cong., 2d Sess. 8 (1934).

The Investment Advisers Act makes it unlawful for an unregistered investment adviser to make use of the mails or any means of interstate commerce in connection with his or its business as an investment adviser. 15 U.S.C. § 80b-3(a). The Act defines "investment adviser" broadly to include

> any person who, for compensation, engages in the business of advising others, either directly *or through publications or writings*, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or *promulgates* analyses or reports containing securities . . . .

15 U.S.C. § 80b-2(a)(11) (emphasis added). The section exempts from the definition of an investment adviser "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation . . . ." *Id.* Section 203 provides for registration of investment advisers and gives the SEC powers of censure, denial, or suspension of registration. 15 U.S.C. § 80b-3(e). The SEC can censure an investment adviser, or suspend or revoke his registration if the adviser or any person associated with him has been convicted within ten years of certain felonies or misdemeanors.[4] The SEC invoked this statutory scheme to revoke the registration of Lowe Management and bar Christopher Lowe from publishing investment advice or associating with an investment adviser.

*The Act's Application to the Lowe Newsletters*

The first step in our analysis of this case is determining whether Lowe's newsletters are within the statutory definition of investment adviser and thus subject to the registration requirement, or whether they are "bona fide newspapers" and thus exempt from the requirement. The

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[4] The Commission may invoke the censure, suspension, and revocation provisions if it finds that such conviction

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense.

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

15 U.S.C. § 80b-3(e)(2).

leading case construing the exclusion for bona fide newspapers is this circuit's *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970). The *Wall Street Transcript* was a weekly tabloid which sold for $5 an issue or $180 per year. The *Transcript* consisted primarily of reports on specific securities, each of which was identified with the name and address of a broker/dealer firm. It also printed some management speeches, miscellaneous personnel announcements, editorials, and advertisements. This court held that the *Transcript* was not per se a "bona fide newspaper" or "financial publication of general and regular circulation" so as to be excluded from the definition of investment adviser. It stated that "[t]he phrase 'bona fide' newspaper . . . means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred." 422 F.2d at 1377. Rather than looking to the purely formal "indicia" of a newspaper, the court examined the substance and content of the publication and found that "[m]ost of its published material consists of reprinted reports assessing various securities issues." 422 F.2d at 1378. It held that "[t]his characteristic emphasis on particular issues and companies at the very least raises doubt about whether the *Transcript* is outside the exclusion—a suspicion which we believe that the S.E.C. should be allowed to investigate." *Id.*

The *Wall Street Transcript* presented a much closer case for exclusion under the Act than does the *Lowe Investment and Financial Letter* or the *Lowe Stock Advisory.* Lowe's newsletters quite clearly are "engage[d] in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchas-

ing, or selling securities . . . ." 15 U.S.C. § 80b-2(11). Under the test of *Wall Street Transcript*, it is equally clear that Lowe's publications are not engaged primarily in "customary newspaper activities," but rather in the activities that the Investment Adviser Act is intended to regulate. Thus, we hold that the SEC properly determined the registration requirements of the Act to be applicable to Lowe's newsletters.

*First Amendment Concerns*

*Wall Street Transcript* held that the Investment Advisers Act does not on its face abridge freedom of the press. In reaching this conclusion, the court stated that

> it is not necessary to enlarge the category of "bona fide" newspapers into an exclusion for all publications which could conceivably be brought within the term "typical newspaper" in order to avoid the "seeds of a constitutional controversy" which the appellee argues would result from an attempt to regulate the conduct of any newspaper publisher.

422 F.2d at 1378-79. Nor did the court believe that it had "to base a construction of the Act on the assumption that the activities involved in giving commercial investment advice are entitled to the identical constitutional protection provided for certain forms of social, political or religious expression." *Id.* at 1379. Instead, the court reasoned that it need only delineate "a boundary between the special type of 'merchandising' activities which must lead to registration and the publication of expression which lies beyond the Act's regulatory purposes." *Id.* In reaching this conclusion, the court cited comments by Justice Harlan in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *See* 422 F.2d at 1379. In that case, Justice Harlan said:

> A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws . . . ." Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not "unconditional." (Citations and footnotes omitted).

388 U.S. 130, 150 (1967). Accordingly, the court held that the registration provisions of the Investment Advisers Act did not violate the First Amendment. 422 F.2d at 1379-80.

The appellees argue that *Wall Street Transcript* is inapplicable to this case because it was decided prior to *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In *Virginia Pharmacy*, the Court invalidated a Virginia statute prohibiting pharmacists from advertising their prices, pointing out that the right to distribute and receive information affecting decisions to buy and sell must be protected in a free society. "[T]he free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765. *See also Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 562 (1980) (rejecting "the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech"), and *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (advertising by attorneys not subject to "blanket suppression," though false, deceptive, or misleading advertising may be suppressed).

We believe that *Wall Street Transcript* still states good law. Indeed, the Supreme Court has affirmed its essential

rationale since its decision in *Virginia Pharmacy.* In *Ohralik v. Ohio State Bar Association*, for example, the Court stated that government "does not lose its power to regulate *commercial activity* deemed harmful to the public whenever speech is a component of that activity." 436 U.S. 447, 456 (1978) (emphasis added). The Court noted

> [n]umerous examples . . . of communication that are regulated without offending the First Amendment, such as the exchange of information about securities, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (CA2 1968), cert. denied, 394 U.S. 976 (1969), corporate proxy statements, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the exchange of price and production information among competitors, *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and employers' threats of retaliation for the labor activities of employees, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

*Id.* It concluded that "[n]either *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation." *Id. See also NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409 (1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); and Note, *Peaceful Labor Picketing and the First Amendment*, 82 Colum. L. Rev. 1469, 1484-88 (1982). Thus, considered in light of *Virginia Pharmacy* and its progeny, we believe that the provisions of the Investment Advisers Act at issue here are precisely the kind of regulation of commercial activity permissible under the First Amendment. Accordingly, we believe that the holding of *Wall Street Transcript* controls this case.[5]

[5] This view necessarily leads us to reject the appellees' contention that the Act violates equal protection by subjecting investment newsletters,

We find additional support for our conclusion in the Seventh Circuit's decision in *Savage v. Commodity Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977) (opinion by Moore, J., of the Second Circuit, sitting by designation). Decided after *Virginia Pharmacy, Savage* nevertheless hewed to the *Curtis Publishing Co./Wall Street Transcript* viewpoint that a business is not immune from regulation merely because it is an agency of the press. *Id.* at 197. On facts closely analogous to those presented by this case, the court held that the publisher of the *Commodity Exchange Bulletin*, a newsletter containing views on the commodity market, was not entitled to registration under the Commodity Futures Trading Commission Act as a commodity trading adviser in view of his previous convictions for securities fraud and mail fraud arising out of the operations of a securities company.

The appellees would distinguish *Savage* on the basis that there the publisher erroneously argued that his commodities newsletter had only the limited protection of commercial speech. They contend that *Savage* was decided before the Supreme Court "clearly indicated" in *Central Hudson Gas* that commercial speech refers only to commercial advertising. They argue that under *Central Hudson Gas* "commercial speech" includes only direct product or service advertising and a seller's indirect or informational advertising. Since Lowe and his companies "do not sell investments [but] report and comment on the investments offered by others," the argument runs, newsletters are not commercial speech.

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but not bona fide newsletters, to regulation. In holding that the publication of investment advice is regulable commercial activity, we necessarily hold also that such newsletters may be treated differently from other publications. This court previously reached the same conclusion in *Wall Street Transcript*, 422 F.2d at 1378-79.

In our view, this argument is unconvincing. Unlike the Third Circuit in *Ad World, Inc. v. Township of Doylestown*, 627 F.2d 1136 (3rd Cir.), *cert. denied*, 456 U.S. 975 (1982), and the court below, we do not believe that the Supreme Court has limited commercial speech solely to product or service advertising. In *Bates v. State Bar of Arizona*, the Court said that "[i]f commercial speech is to be distinguished, 'it must be distinguished by its content,' " not its form, 433 U.S. 350, 363 (1977) (quoting *Virginia Pharmacy*, 425 U.S. at 761)). Although *Central Hudson Gas* stated that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising," 447 U.S. at 563, the Court did not define commercial speech in these terms. Rather it defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Id.* at 561. Similarly, in *Friedman v. Rogers*, the Court stated "[b]y definition, commercial speech is linked inextricably to commercial activity . . . ." 440 U.S. 1, 10 n.9 (1979). *Cf. Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 n.14 (U.S. June 24, 1983) (expressing "no opinion as to whether reference to any particular product or service is a necessary element of commercial speech"). These definitions do not limit commercial speech to advertising and are broad enough to encompass Lowe's publications. Thus, although we think it preferable to analyze this case as one involving the permissible regulation of economic activity, we believe that the Investment Advisers Act withstands constitutional scrutiny under First Amendment doctrine relating to commercial speech as well.[6]

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[6] Recent Supreme Court decisions suggest that a similar "middle level" protection is appropriate for certain kinds of speech, for example, in cases of regulation of commercial advertising (*Virginia*

Lowe and his companies argue that in view of the fact that the Commission has never challenged any of the substantive material contained in any of their publications, it may not "rely on the mere possibility of future deception as a ground for the outright prohibition of the publications even under a commercial speech analysis." In essence, they charge the SEC with impermissible prior restraint. Whether we approach this case emphasizing its aspect of the regulation of a profession or view its principal thrust as pertaining to commercial speech, this argument is unavailing.

Before the SEC may revoke an adviser's registration, the Investment Advisers Act requires a finding of misconduct reflecting adversely on the honesty of the adviser, an essential attribute of a person entrusted to deal with intangible products which have numerous, intricate facets as securities do. *See* 15 U.S.C. § 80b-3(e)(2). The appellees rely on such cases as *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979), in arguing that a finding of past misconduct may not serve as the basis for revoking an investment adviser's license. But the regulation of advisory publishers is properly compared, we believe, not to the licensing of theater operators, but rather to the licensing of professionals. *See, e.g., Ohralik v. Ohio State Bar Association*, 436 U.S. at 460; *Watson v. Maryland*, 218 U.S. 173, 177-78 (1910); *Dent v. West Virginia*, 129 U.S. 114, 121-23 (1889). The denial of a professional license for criminal conduct has been a

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*Pharmacy*, 425 U.S. 748 (1976)); zoning of theaters which play "adult," but not obscene, films (*Young v. American Mini Theatres*, 427 U.S. 50 (1976); labor picketing regulation (*NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980)); and the regulation of professions (*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1977)). Thus, whether we view this case as one involving commercial speech or the regulation of the professions, the Investment Advisers Act does not conflict with the First Amendment.

traditional, and perhaps necessary, aspect of this type of regulation. *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954); *Doe v. Webster*, 606 F.2d 1226, 1239 n.51 (D.C. Cir. 1979). Thus, we believe that the SEC may bar Lowe from the profession of investment adviser because of his past criminal conduct.

That commercial speech is involved leads to no different result. In *Friedman v. Rogers*, the Supreme Court found it irrelevant that the use of a trade name was "not in fact misleading" since it was a type of speech which "enhances the opportunity for misleading practices." 440 U.S. at 15. As this court noted in *Jay Norris, Inc. v. FTC*, "[t]he prohibition in *Friedman* was a total ban on a business practice or form of advertising because of the *potential* for deception . . . ." 598 F.2d at 1252 (emphasis added). Just as the potential for deception may justify the regulation of a profession, *see, e.g., Ohralik*, 436 U.S. at 461-62, so, too, the potential for deception permits government to ban potentially deceptive commercial speech. *See Friedman*, 440 U.S. at 15; *Central Hudson Gas*, 447 U.S. at 563-64. In light of Lowe's history of deceptive, criminal conduct as an investment adviser, his publications may fairly be characterized as potentially deceptive commercial speech.

The appellees would have the SEC wait until Lowe had committed further violations of the securities laws and then somehow punish him while apparently permitting him to continue publishing. Such a remedy would hardly be effective redress for the affected public. The regulation of professions is intended to prevent harm to the public before it occurs, not after it is done. Saying that appellees may not sell their views as to the purchase, sale, or holding of certain securities is no different from saying that a disbarred lawyer may not sell legal advice. Thus,

we hold that the authority to revoke Lowe's registration as an investment adviser, and as a result to bar him from publishing his newsletters, does not violate the First Amendment.

Finally, we note what this holding does not entail. Lowe is not prohibited from publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely. He is not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer. What he is prohibited from doing is selling to clients advice and counsel, analysis and reports as to the value of specific securites or as to the advisability of investing in, purchasing or selling or holding specific securities.[7]

Judgment reversed.

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VAN GRAAFEILAND, *Circuit Judge*, Concurring:

Although, ordinarily, I would be content simply to concur in Judge Oakes' thoughtful and well-reasoned opinion, the strong portest registered in Judge Brieant's dissent prompts me to pen this brief concurring opinion.

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[7] We leave to another day the question whether a publication dealing only with market indicators generally or making recommendations only as to groups of securities (e.g., air transport, beverages-brewers, mobile homes) could be barred on facts such as those of this case.

At the outset, I agree with Judge Oakes that, if a doctor must be licensed to write prescriptions and a lawyer to argue appeals, there is no reason why, in the public interest, an investment adviser should not be required to register before he can give investment advice. Where the standard for the granting of a license is "public interest, convenience, or necessity," the denial of a license on that ground, if provided for by statute, is not a denial of free speech. *See National Broadcasting Co. v. United States*, 319 U.S. 190, 226-27 (1943). It is now settled beyond dispute that, in performing its assigned duties, the SEC acts as a "statutory guardian charged with safeguarding the public interest in enforcing the securities laws." *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).

Congress was sufficiently concerned about violations of the Investment Advisers Act that it provided severe criminal penalties for willful violations thereof. 15 U.S.C. § 80b-17. The fact that the prohibited acts involve speech does not make them any the less unlawful. "The use of a printed message to a bank teller requesting money coupled with a threat of violence, the placing of a false representation in a written contract, the forging of a check, and the false statement to a government official, are all familiar acts which constitute crimes despite the use of speech as an instrumentality for the commission thereof." *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982).

If the giving of investment advice by an unregistered investment adviser is unlawful, a court, after proper hearing, should be able to prohibit it, especially where the prohibited acts constitute a continuation of conduct already found to be unlawful. *See Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S.

489, 496 (1982), *Central Hudson Gas & Elec. Corp. v. P.S.C.*, 447 U.S. 559, 563-64 (1980); *Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations*, 413 U.S. 376, 389-90 (1973). A good illustration of the exercise of this constitutional power can be found in the use of injunctions to restrain unlawful trade practices. *See Nat. Soc. of Prof. Engineers*, 435 U.S. 679, 697 (1978). As the Court said in *Lorain Journal Co. v. United States*, 342 U.S. 143, 156 (1951), "Injunctive relief under § 4 of the Sherman Act is as appropriate a means of enforcing the Act against newspapers as it is against others." In short, if, as the dissent agrees, "Lowe may not practice as . . . an investment adviser," he should not be permitted to give investment advice.

Judge Brieant's concern about the terms of the injunction to be issued by the district court is, I suggest, premature and fails to take into account the skill and ingenuity of Judge Brieant's colleagues in the district court. The activities of an investment adviser which Lowe unlawfully has been carrying on are described in 15 U.S.C. § 80b-2(a)11. Although, as a general rule, a district court should not content itself with issuing an "obey the law" injunction, it quite properly may frame the injunction in terms of the specific statutory provision which the court concludes has been violated. *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1103 (2d Cir. 1972); *United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979). I have no doubt that, upon remand, the district court can frame an injunction so that Mr. Lowe "will know what the court intends to forbid."

BRIEANT, *District Judge*, dissenting:

I interpret the majority opinions as commanding the district court, without balancing the equities, to impose an injunction upon appellee Lowe and his affiliates which, at best, will be illusory and unenforceable, and at worst, constitutes a prior judicial restraint upon the publication of regularly issued journals of fact and opinion, "investment newsletters," therein described. Because I regard this prior restraint on publication as inappropriate; neither constitutional in light of the First Amendment; nor required by the Investment Advisers Act of 1940 ("the Act"); nor justified by our prior decisions; I respectfully dissent.

I

I agree that Lowe may not practice as, nor hold himself out to be, a registered investment adviser under the Act, nor may he engage in any fraudulent activity in connection with his publications. *Cf. SEC* v. *Capital Gains Research Inc.*, 375 U.S. 180 (1964); *Courtland* v. *Walston & Co.*, 340 F.Supp. 1076 (S.D.N.Y. 1972).

Lowe's investment newsletters, fairly described by the majority, are publications of the sort issued on a schedule, rather than timed for release attuned to specific market events. Delivered by mail, they are several days old when read, and convey the same facts and opinion to all readers. Typically such newsletters accept any subscriber who wishes to become such and is willing to pay the standard annual subscriber's fee. The expression of opinion by that means is poles apart from the traditional giving of investment advice; just as remote as a health care publication (*e.g.*, "Prevention Magazine") is from the practice of medicine, or a book advising how to avoid

probate is remote from the practice of law. The latter require a medical or law degree and a license, while the former are protected First Amendment expression. *See New York County Lawyers Association* v. *Dacey*, 21 N.Y.2d 694, *rev'g.*, 28 A.D.2d 161 (1967); Elman, Commr., *dissenting* in *Rodale Press, Inc., et al.* v. *Federal Trade Comm.*, 71 F.T.C. 1184, 1247-1253 (1967), *quoted with approval* by *Robinson, III*, J., concurring in *Rodale Press, Inc.* v. *Federal Trade Commission*, 407 F.2d 1252, 1258 (D.C. Cir. 1968).

An investor counseling with an adviser, directly, or by means of a telephone hotline, receives timely non-public advice, usually individualized, by which he hopes to gain an "edge" on others in the market. By reason of its clandestine or confidential character, such advice is particularly susceptible to fraud or manipulation. However, the contents of a newspaper are public when published, and the counsel so given is immediately known to all, including the watchful eyes of the SEC.

## II

Discussion of the issue of so-called "commercial speech" by the majority is of great interest, but little assistance to the resolution of this case. In my view these newsletters are not "commercial speech," any more than our most respected daily newspaper is "commercial speech." Lowe is not selling securities or advertising investment advice; he is selling his publications themselves, and his editorial expression of the facts and opinions therein set forth. Like all publishers, Lowe charges subscription fees for his publications. I concede that the readers (subscribers) are seeking opinion and information to aid in their investment decisions, and Lowe intends this result.

When readers seek health information, they subscribe to health oriented publications, for spiritual advice they read religious tracts, and for astrology they read sidereal almanacs. Freedom of the press is not limited to the pamphleteer who hands out his tracts free of charge, nor is the right to write, and publish about investments without license limited to "bona fide publications of general and regular circulation," if those words found in the Act are to be read restrictively so as to exclude any paper eligible to be entered at the post office as second class mail matter. *See H.W. Wilson Co.* v. *United States Postal Service*, 438 F.Supp. 326 (S.D.N.Y. 1977), *aff'd.* 580 F.2d 33 (2d Cir. 1978) (construing prior statute).

With characteristic understatement, the court below termed "questionable" the SEC's contention that these publications constituted "commercial speech," 556 F.Supp. at 1366, and suggested that commercial speech is confined properly to instances of service or product advertising. On appeal, the SEC takes issue with this view, and the majority now rejects it as well, holding that commercial speech is sufficiently broad in scope to encompass the sale of a journal of fact and opinion to paid subscribers.

Our attention is directed to the several recent articulations of what constitutes "commercial speech," which are said to establish that "commercial speech" is not confined to advertising, but extends to all "expression related solely to the economic interest of the speaker and its audience." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm.*, 447 U.S. 557, 561 (1980). Consideration of the Supreme Court's attempts at redefinition since *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) convinces me that the concept of commercial speech has now been confined to

naked advertising and closely related methods of commercial solicitation. A fair consideration of recent Supreme Court learning suggests that *Sec* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), relied on by the majority, is now as dead as Marley, and if not dead, readily distinguished.[1] Each recent Supreme Court commercial speech case has arisen in the context of service or product *advertising*. Thus, in addition to the ban on advertising by pharmacists, considered in *Virginia Pharmacy*, *supra*, the Court has addressed restrictions on attorney advertising and solicitation [*Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *Matter of R.M.J.*, 455 U.S. 191 (1982)]; a ban on the use of "For Sale" signs by sellers of residential property [*Linmark Associates Inc.* v. *Willingboro*, 431 U.S. 85 (1977)];

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1 It must be noted that *Wall Street Transcript* was a "chilling" case, not a prior restraint case. When a contention is advanced that First Amendment rights are being chilled by official action, a Court is required only to balance the interest being served by the governmental action against the degree of chill. *See Waterfront Commission* v. *Local 1814, Longshoremen, etc.*, 667 F.2d 267 (2d Cir. 1981).

Similarly, *Savage* v. *Commodities Futures Trading Commission*, 548 F.2d 192 (7th Cir. 1977) relied on by the majority, is disinguishable. In *Savage*, Judge Moore was concerned only with the question of whether the Commission's order refusing petitioner's registration as a commodity trading adviser should be reversed. Although petitioner so argued, prior restraint of the press was not an issue in that case. The gist of *Savage* may be found in the comment by the Court that:

> "[I]t has long been recognized that the [First] Amendment does not remove a business engaged in the communication of information from general laws regulating business practices." Citing *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967).

I agree so long as prior restraint on publication is not involved. But see, *SEC* v. *Blavin*, 557 F.Supp. 1304, 1310 (E.D. Mich. 1983) in which, in addition to protecting the right to publish, the Court required the SEC to grant defendant registration as an investment adviser.

restrictions on the use of trade names by optometrists [*Friedman* v. *Rogers*, 440 U.S. 1 (1979)]; a ban on advertising by a public utility [*Central Hudson Gas, supra*]; and, most recently, a federal statutory restriction on advertising mixed with expressions of opinion by manufacturers of prophylactics [*Bolger* v. *Youngs Drug Products Corp.*, ____ U.S. ____, 51 U.S.L.W. 4961 (June 24, 1983)]. See also *Metromedia Inc.* v. *San Diego*, 453 U.S. 420 (1981) (restrictions on commercial and non-commercial billboard advertising).

That each of the cases in which the Court has sought to clarify the "commercial speech" doctrine has arisen in the context of attempts to regulate or prohibit advertising, while significant, does not, standing alone, demonstrate conclusively that commercial speech is restricted to advertising and equivalent economic promotional activities. However, examination of the characteristics of commercial speech which have caused the Supreme Court to accord to it a lesser degree of First Amendment protection demonstrate that since 1976 all speech so considered has been inextricably intertwined with advertising. Thus, in *Virginia Pharmacy Board, supra*, reference to commercial speech is in the context of a discussion of advertising, and the interests of both the advertiser and the consumer in the flow of commercial information. Support for the argument that commercial speech essentially comprises some sort of advertising or equivalent economic promotional activity is also found in *Central Hudson Gas, supra*, in which the Court invalidated a New York State regulation prohibiting the promotion of electricity consumption through advertising. The Court in that case addressed the interests served by commercial expression: "In applying the First Amendment to this area, we have rejected the 'highly paternalistic' view that government

has the complete power to suppress or regulate commercial speech . . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all." 447 U.S. at 562 (citations omitted). Significantly, the Court in *Central Hudson Gas* states that the very basis of the First Amendment's concern for commercial speech is the "*informational function of advertising*." *Id.* at 563, emphasis added.

Of greatest interest, probably because it is most recent, is *Bolger* v. *Youngs Drug Products Corp.*, *supra*, where the Court unanimously invalidated a Postal Service prohibition of unsolicited mailings, one of which conveyed "truthful information relevant to important social issues such as family planning and the prevention of venereal disease." (Marshall, J. at 51 U.S.L.W. 4963). The Court noted that some content-based restrictions on commercial speech are justified in light of the "greater potential for deception or confusion in the context of certain advertising messages" (51 U.S.L.W. at 4962), but also held that "the mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech," citing *New York Times* v. *Sullivan*, 376 U.S. 254, 265-66 (1964), *id.* at 4963.[2]

I conclude that in the wake of *Bolger*, commercial speech which goes beyond mere advertising, so as to

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2 One of the pamphlets in *Bolger* purported to be an expression of fact and opinion rather than an advertisement. In an inconspicuous place, it bore the self-serving statement that it was "contributed as a public service" by Youngs Drug Products Corp. See n. 4, *Bolger*, *supra*, 51 U.S.L.W. at 4962. There is no bright line by which an advertisement can be distinguished on its face from a statement of fact and opinion *actually* presented as a public service by a commercial enterprise. Nor is there any reason to believe that a corporation has less First Amendment rights than an individual.

include expression of fact and opinion implicating (as does an investment newsletter or a health newsletter, or even a racetrack tout sheet), "substantial individual and societal interests" (*id.* at 4963), now enjoys full First Amendment protection, at least insofar as prior restraint is concerned. In short, even if these newsletters were commercial speech, which they are not, I believe they would be entitled to full First Amendment protection from prior restraint. As Justice Rehnquist, concurring in *Bolger* observed, "the First Amendment, which was designed to prevent the government from suppressing information, requires us 'to assume that this information is not in itself harmful, that people will perceive their own interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them,' [citation omitted]." *Id.* at 4966.

In explaining why commercial speech should be entitled to a lesser degree of First Amendment protection than other communication, the Court, both in *Virginia Pharmacy Board* and *Central Hudson Gas*, *supra*, relied on two aspects of commercial speech which set it apart:

> "First, commercial speakers have extensive knowledge of *both* the market *and their products*. Thus, they are well situated to evaluate the accuracy of their messages and the unlawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Central Hudson Gas*, 447 U.S. at 564, n. 6, citations omitted, emphasis added. *See also Virginia Pharmacy*, 425 U.S. at 771-72, n. 24.

The difference between such "commercial speakers" mentioned in *Central Hudson Gas* and Lowe are readily apparent. The publishers here are not selling their own investments, nor are they urging their subscribers to invest in a business in which the defendants have a financial stake. Lowe's publications do not comment about *his own products*; they analyze and evaluate the securities offered by third parties. In this respect, the investment newsletters do not differ in principle from well-known periodicals such as *Barron's*, *Forbes*, or *Consumer Reports*. Presumably, the majority would not contend that insofar as these publications of general circulation perform a similar function, they would become subject to similar licensure or prior restraint.

In addition to linking advertising to commercial speech, the Court in *Virginia Pharmacy* reiterated an earlier definition of commercial speech as expression which does "*no more than* propose a commercial transaction." *Id.* at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Commission*, 413 U.S. 376, 385 (1973) (emphasis added). Enough has been said concerning the contents of the Lowe newsletters to demonstrate that they do more than "propose commercial transactions."

Finding commercial speech to be "squarely" presented in *Virginia Pharmacy Board*, the Court stated that this was because the pharmacist challenging the Commonwealth's restrictions on his advertising:

> "does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The 'idea' he wishes to communicate is simply this: 'I will sell you X prescription drug at the Y price.' " 425 U.S. at 761.

Here, in contrast, the appellees *do* seek to report "newsworthy facts" and make "generalized observations" about economic and financial conditions as well as recommending stocks and issuers, the latter inextricably entwined with the former.

We address here not the power to regulate, or punish fraud after publication, but the power to impose prior restraint. Investment opinion, in my opinion, is as much speech protected from prior restraint as is political opinion, philosophy or gibberish. Not only for the Zengers, the Patrick Henrys and the Ellsbergs was this basic freedom secured, but also for an ex-convict whom the majority assumes to be motivated towards recidivism.

A judicial system which will not enjoin a libel [*Brandreth* v. *Lance*, 8 Paige Ch. 24 (N.Y. 1839)], and will not enjoin publication of the Pentagon Papers [*New York Times Co.* v. *United States*, 403 U.S. 713 (1971)], should not countenance a prior restraint on publication of a regularly issued newsletter containing fact and investment opinion. Even if Lowe's publications constitute commercial speech, the prior restraint sought to be imposed is unconstitutional. In *Central Hudson Gas*, *supra*, the Court held that restraints will be upheld only if "the regulation directly advances the governmental interest asserted," and "it is not more extensive than is necessary to serve that interest." 447 U.S. at 566. These restraints do not qualify. See *infra*, p. 13.

Any prior restraint comes to Court with a "heavy presumption against its constitutional validity." *Bantam Books* v. *Sullivan*, 372 U.S. 58, 70 (1963). This results from the devastating impact prior restraints have on the exercise of First Amendment rights, far exceeding a mere "chill":

"Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. They differ from the imposition of criminal liability in significant procedural respects as well, which in turn have their substantive consequences. The violator of a prior restraint may be assured of being held in contempt; the violator of a statute punishing speech criminally knows that he will go before a jury, and may be willing to take his chance, counting on a possible acquittal. A prior restraint, therefore, stops more speech more effectively. A criminal statute chills, prior restraint freezes. Indeed it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech." Bickel, *The Morality of Consent*, 61 (1975), quoted with approval in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 559 (1976).

Because of this devastating effect on freedom of speech, previous restraints will be upheld only in "exceptional" cases, *e.g.*, the "threat of a grave and immediate danger to the security of the United States," *United States* v. *New York Times Co.*, 444 F.2d 544 (2d Cir. 1971), *rev'd on other grounds*, 403 U.S. 713; see also Brennan, J. concurring in *New York Times*, *supra*, 403 U.S. at 726.[3]

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3 There is no clear and present danger shown to the national security which would justify such an injunction. The majority apparently assumes that because of his criminal record and allegedly bad character, Lowe is more likely to publish false ideas than are others, but not if he is working for somebody else's paper. This is illusion, and threatens disaster.

III

To affirm the trial court here, it is not necessary, in my view, to hold that the Act is facially unconstitutional as a press licensing scheme. Certainly it was not so intended; Congress understood about the First Amendment. Its legislative product should not lightly be construed as intended to effect an unconstitutional result nor to impose an undue or useless degree of regulation upon a constitutionally protected activity. However, if the provision of the Act which exempts a "bona fide [publication] of general and regular circulation," found at 15 U.S.C. § 80b-2(11) (1976), is to be read as literally and narrowly as the majority would have it, this means to me that some judge, at the instance of the SEC, will be called upon to adjudicate the *bona fide vel male fide* of a newspaper, to determine if it is to be subject to prior restraint should it contain investment opinion or "recommend" a security. This leaves a dangerous editorial evaluation in hands not to be trusted with such a decision, and requires a determination for which no satisfactory objective standard is provided. We have held "Courts should be chary of deciding what is and what is not news" [Meskill, J. dissenting in *Harper & Row Publishers Inc.* v. *Nation Enterprises*, ____ F.2d ____ (2d Cir. November 17, 1983, Dkts. 83-7277, 83-7327, slip op. at 213), a view adopted by majority op. at 194]. I suggest we must be even more chary in undertaking to determine when or whether a publication is "bona fide," unless such words are regarded as broad enough to comprise *all* regularly issued publications containing fact and opinion and available to all who would subscribe, as Lowe's newsletters are.

The Act, as construed by the majority seems both under and over inclusive. In theory, Lowe's entire expres-

sion of views could appear in our favorite local newspaper without official hindrance. Suppose following remand, Lowe should transfer stock ownership of his corporations to a friend and add to his newsletters a tidetable, a list of ship arrivals, Ann Landers, a crossword puzzle and selections reprinted from *Areopagitica*? Would his newsletters now be *bona fide* newspapers, in the eyes of the majority? I submit that on First Amendment and prudential grounds a decision that they would not be is beyond the power of any court to make. In short, I do not question the power of government to license lawyers, doctors, accountants, registered representatives employed by stockbrokers and those giving individualized investment advice or holding themselves out as investment advisers, and similar professionals. However, the right to licensure, and the concomitant power to restrict entry into the licensed occupation, does not in America extend to writers or publishers.

Licensing of the press was abandoned in England in 1694, but the memories of this imposition upon the natural rights of man lingered sufficiently to lead to the enactment of the First Amendment almost a century later. An intention to disregard this vital Constitutional imperative should not lightly be imputed to Congress.

I would construe the Act essentially as did the court below. In this connection, I am puzzled by the provision in the majority opinion (slip op. at 22), which provides that Lowe is "not prohibited from publishing a newspaper of general interest and circulation, nor is he prohibited from publishing [investment] recommendations in *somebody else's bona fide* newspaper as an employee, editor or writer." (Emphasis added).

I fail to see how it can be adjudged that Lowe can exercise his First Amendment protected expressions as to

investments, but only so long as he is not himself the owner or proprietor of the publication in which his views appear. Such a distinction must assume that the owner or proprietor of a *bona fide* newspaper will exercise some control over Lowe's writings so as to prevent fraud. There is no assurance that this would be so. And I am appalled by the thought that in order to enforce the injunction to be granted on remand, the trial court may be required to snoop into the corporate records of a publication to find out whether it is directly or indirectly owned by Lowe, in order to make the adjudication as to whether or not it is "*somebody else's* bona fide newspaper." A court of equity should not utter an injunction which might give rise to such intrusions in a First Amendment protected area such as a newspaper office.

## IV

There are prudential reasons apart from the Constitutional issues heretofore discussed, which militate against the granting of injunctive relief in the form directed by the majority.

I cannot express a better description of a typical investment newsletter than that found in the majority opinion; whether in recommending specific stocks or predicting near and long term market trends, Lowe, and the typical investment newsletter writer is in effect "publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions, or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely." (Majority slip op. at 22). Yet that is what the majority says Lowe is

*not*, on remand, to be prohibited from doing. He will become a criminal contemnor if, but only if, he writes and publishes "as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." (Slip op. at 23). While footnote 6 of the opinion purports to reserve decision (*i.e.*, "leave to another day") as to whether Lowe may publish "dealing with market indicators generally," and "making recommendations only as to groups of securities," (slip op. at ii, n. 6), no logical basis is presented for the court on remand to allow the recommendation of groups of securities but not individual stocks. Faced with the necessity of framing an injunction which preserves Lowe's conceded right to express his views as to the effect of current events on market conditions, and yet prevents any "recommendation" of specific securities, the district judge will be confronted with extreme difficulty. The injunctive decree of a court of equity must be intelligible and practical; it must draw a bright line, and should produce benefits at least equal to its social burdens. Equity requires that those enjoined receive "explicit notice of precisely what conduct is allowed." *Schmidt* v. *Lessard*, 414 U.S. 473 (1974). In *Diapulse Corp. of America* v. *Carba Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980) we held, per Judge VanGraafeiland:

> "A court is required to frame its orders so that those who must obey them will know what the Court intends to forbid . . . . It is for this reason that Fed.R.Civ.P. 65(d), like its predecessor. provides that every order granting an injunction shall be specific in terms and describe in reasonable detail the acts sought to be restrained. An order which does not satisfy the requirement of specificity and definiteness will not withstand appellate scrutiny."

*See also, United States* v. *Charmer Industries, Inc.*, ____ F.2d ____ (2d Cir. November 30, 1983) (*Charmer II*) *Schurr* v. *Austin Galleries of Illinois, Inc.*, ____ F.2d ____ (2d Cir. October 5, 1983) (slip op. at 6814, Van Graafeiland, J. concurring).

This requirement is especially important where First Amendment freedoms are implicated. *Organization For a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931). The injunction which the majority commands cannot be framed in compliance with the directions given, so as to insure that constitutionally protected expression will not be stifled, along with the investment advice on specific issues which the Court finds Lowe may no longer express.

In a case involving an attempt to enjoin the showing of motion pictures, the Fifth Circuit noted the difficulty inherent in attempting to enjoin future expression on the basis of unprotected past conduct, where a statute permitted the closing for one year of any theatre which had exhibited an obscene film:

> "Thus, [under the statute] future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota*." *Universal Amusement Co., Inc.* v. *Vance*, 587 F.2d 159, 165 (5th Cir. 1978).

While stated in the context of an attempt to prevent obscenity, the Fifth Circuit's reasoning is applicable to this case as well. In light of the difficulty of framing an injunction which would prevent Lowe from recommending specific securities, while at the same time preserving

his right to comment on "any matter of current interest," any injunction issued will have the effect of stifling constitutionally protected expression, thus amounting to an impermissible prior restraint on publications which have not yet been found to constitute "investment advice." *Cf. Universal Amusement Co., Inc., supra* at 169. Lowe's difficulty in knowing what will violate the terms of an injunction formulated according to this Court's directive will result in "self-censorship, a particularly subtle and most insidious form of the malady" of prior restraint. *Universal Amusement Co, Inc., supra* at 166.

Probably, following remand, this articulate litigant will demonstate what a panel of this Court has previously described as an "ability to improvise and [a] flair for the creative" and bring about the same difficulty encountered when, in response to an overly broad injunction, oenologist Walter S. Taylor began to refer to himself as "Walter S. Xxxxxx," and depict himself on his wine bottles in a "Lone Ranger" type mask. *See Taylor Wine Co., Inc.* v. *Bully Hill Vineyards, Inc.*, 590 F.2d 701, 702-03 (2d Cir. 1978).

Injunctions which are unclear or easily set at naught should not be issued in the first place. There exists already more than adequate statutory protection, both penal and civil, against mail fraud, wire fraud, securities fraud and breach of fiduciary duty in writing about investments. An injunction of this sort, particularly because of its illusory character, will add little to the protection of the public. This is especially true in this case because the majority will apparently allow Lowe to express his opinions freely and without limitation "in somebody else's bona fide newspaper as an employee, editor, or writer" (slip op. at 22).

Any balancing of the equities, essential before any injunction is granted, should weigh the benefit to the public (nil in this case because of the injunction's vague, subjective and illusory nature) against the burdens on those enjoined, severe in this case because free expression may be enjoyed only at great personal risk to Lowe, or his potential news publishing employers who might have to prove they are *bona fide* and not indirectly owned by Lowe.

This is not to mention the impossible burden of enforcement imposed on the district court.[4]

And for what is all this great effort? I agree with Chief Judge Weinstein below that "the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public," (556 F.Supp. at 1366) and therefore a balancing of the equities requires that no injunction issue.

Essentially for the foregoing reasons, as well as those expressed by Chief Judge Weinstein in his opinion below, I believe that the judgment appealed from should be affirmed.

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4 There are probably a thousand and one ways to recommend a specific stock without using the word "recommend." Any puff piece published to investors about a business or an industry in effect "recommends" the stock thereof. The court below following remand would seem to be at a loss to determine whether a contempt has been committed, or not, so long as the evil word "recommend" is not used.

## Memorandum and Order

SECURITIES AND EXCHANGE COMMISSION,
*Plaintiff,*

*v.*

CHRISTOPHER L. LOWE a/k/a CHRIS L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION, LOWE STOCK CHART SERVICE INC.,
*Defendants.*

No. 82 Civ. 1616.

United States District Court,

E.D. New York.

Feb. 1, 1983.

WEINSTEIN, Chief Judge:

The Securities and Exchange Commission seeks an order enjoining Christopher Lowe and his corporations from publishing investment advisory materials. Jurisdiction is premised on Section 214 of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 (1976). Lowe has been barred by the SEC from associating with any investment adviser and Lowe Management Corporation's investment adviser registration has been revoked.

Despite the substantial government interest in maintaining the integrity of the securities industry and the legitimate

concern of the SEC about possible publication abuse, an injunction against publication must be denied except in a minor respect designed to insure against personal professional contact between Lowe and his readers. The Advisers Act, reasonably construed to avoid an impermissible encroachment on first amendment freedoms—particularly in light of available alternatives for safeguarding the public—does not authorize such prior restraint.

## I.

### Facts

The SEC's lack of confidence in Lowe is not without basis. He was convicted in New York in 1977 of appropriating funds of an investment client and of failing to file as an investment adviser with New York's Department of Law. In 1978 he was convicted of tampering with evidence to cover up fraud on an investment client and of stealing from a bank. A New Jersey court sentenced him to three years imprisonment in 1982 on two counts of theft by deception through issuance of worthless checks.

Nevertheless, Lowe's urge to share his knowledge of finance continues unabated. Directly and through various corporations, he is responsible for a number of publications:

1. *The Lowe Investment and Financial Letter* is a market newsletter. A typical issue contains general observations on and assessments of the securities and bullion markets, a review of numerous market indicators, market strategies, and specific recommendations for buying, selling, or holding stocks and bullion. The newsletter is advertised as a semi-monthly publication, but at least since May 1981,



it has appeared only at irregular intervals, with a total of eight issues appearing from that time through August 31, 1982. According to the publisher a year's subscription ordinarily costs $195, but a promotional subscription has recently been offered at reduced rates, from $39 for one year to $79 for three years. The newsletter presently has approximately 2,408 subscribers whose subscriptions vary in length from three months to three years.

2. *The Lowe Stock Advisory* also analyzes and comments on the securities and bullion markets. This market letter specializes in low-priced stocks—costing under $20—listed on the New York and American Stock Exchanges and traded in the over-the-counter market. Potential subscribers are advised that they will receive periodic letters with market information and analysis and updated recommendation sheets on specific securities. Since May 1981, only four letters have been published and distributed, the last of which was dated November 16, 1981. They have included recommendations on various stocks. Lowe Stock Advisory subscriptions cost between $39 for one year and $79 for three years. Subscribers to the Lowe Investment and Financial Letter have been offered a complimentary six-month subscription. The publication has approximately 278 paid and 397 unpaid subscribers.

Both the Lowe Letter and Lowe Stock Advisory advertise a telephone hotline. Subscribers can call to get current information.

3. *The Lowe Stock Chart Service* has been advertised as a weekly publication containing charts for all stocks listed on the New York and American Stock Exchanges and

for the 1,200 most widely traded over-the-counter stocks. It will also contain charts on gold and silver prices and market indicators. No investment advice will be offered. No issues of this publication have yet been distributed, though two announced dates for initial publication have come and gone. Regular subscription rates for the chart service run from $325 for three months to $900 for one year, with a special pre-publication offer including a $33 five-week trial. There are some forty subscribers to this publication.

Subscribers to these services called as witnesses by the SEC generally were satisfied with what they received. Their main complaint was the lack of regularity of publication—an understandable problem in view of the amount of time the publisher has been devoting in recent years to defending himself before federal and state law enforcement agencies.

In 1979 the SEC instituted administrative proceedings against Lowe and Lowe Management Corporation. These culminated on May 11, 1981 in the Commission's order under section 203(e), (f) of the Advisers Act, 15 U.S.C. § 80b-3(e), (f) (1976), revoking the registration of the Lowe Corporation as an investment adviser and barring Lowe from association with any investment adviser. Advisers Act Release No. 759. The Commission based its order on an administrative law judge's finding that Lowe had misappropriated client funds (in the case leading up to Lowe's plea in New York State court to tampering with evidence) and that Lowe Corporation had failed to promptly amend its investment adviser registration (Form ADV) to disclose Lowe's New York convictions, in violation of section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), and Rule 204-1(b), 17 C.F.R. § 275.204-1(b) (1982). Lowe argued



before the Commission that he had ceased to handle clients' funds and securities and was engaged solely in the publication of investment newsletters, so that the sanctions sought to be imposed were inappropriate and excessively severe. The Commission, however, agreed with the administrative law judge that the defendants' publication activities harbored "opportunities for dishonesty and self-dealing."

In the present suit the SEC alleges that the defendants have engaged in the business of an investment adviser without being registered pursuant to section 203(c) of the Advisers Act, 15 U.S.C. § 80b-3(c) (1976); that by not revealing to their subscribers Lowe's criminal convictions and the 1981 order of the Commission, they have engaged in fraudulent practices in violation of section 206 of the Act, 15 U.S.C. § 80b-6; and that in publishing the investment newsletters, they are in violation of the Commission's 1981 order, which is itself judicially enforceable under section 209 of the Act, 15 U.S.C. § 80b-9. The SEC seeks an order enjoining further publication by the defendants of investment advisory materials and enforcing the Commission's 1981 order, and an order directing defendants to disgorge all subscription monies received since 1981 in connection with their publications.

## II.

### Law

The central issue is whether the SEC is authorized to withhold registrant status of anyone seeking to sell impersonal investment advice through subscription newsletters and by this denial to cut off publication. A further question

is whether, under the statute and the rules and regulations of the Commission, defendants had a duty to disclose to their subscribers Lowe's convictions and the 1981 order of the Commission, so that their failure to do so constituted a fraud in violation of section 206 of the Act, 15 U.S.C. § 80b-6 (1976).

A. *Advisers Act*

Section 202(a)(11) of the Act, 15 U.S.C. § 80b-2(a)(11) (1976), defines "Investment Adviser" broadly. It includes:

> any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .

The section provides an exemption for, inter alia, "(D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Congress concluded that publications providing general business and financial information pose less dangers to the public than specialized advisory publications designed particularly for potential investors. Given the limited resources available to the SEC, Congress was entitled to direct the government's finite powers of enforcement to the point of maximum danger.

The registration requirement and the relevant powers of the Commission are set forth in section 203, 15 U.S.C. § 80b-3 (1976). They are designed to control advisers and



to prevent those who are not registered from giving investment advice. Subsection (a) declares it

> unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

Under subsection (c) the Commission is authorized to grant or deny applications for registration and under subsection (e) to censure, place limitations on the activities, functions, or operations of, suspend or revoke the registration of any investment adviser. The statutory grounds for imposing sanctions against registered advisers include having been convicted of any crime that "involves . . . the making of a false report . . . [or] perjury," or "involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities." 15 U.S.C. § 80b-3 (e)(2). Subsection (f) empowers the Commission to censure, place limitation on, suspend, or bar the association of any person with an investment adviser.

These provisions of the Advisers Act are part of the comprehensive federal regulation of the securities industry. The impetus for federal securities regulation was the irresponsible and dishonest securities practices of the 1920's. H.R.Rep. No. 85, 73d Congress 1st Sess. 2 (1933); Landis, The Legislative History of the Securities Act of 1933, 28 Geo.Wash.L.Rev. 29, 30 (1959). Although the most pressing concerns of the drafters of the early securities laws were with issuers and underwriters, brokers and dealers, insiders and manipulative traders whose activities were most clearly and directly responsible for the collapse of the market,

journalists were also implicated in securities deceptions. The Senate Report on the Securities Exchange Act of 1934 noted

> that it was not uncommon for market operators to employ a publicity agent to tout a stock in which they were momentarily interested. In one instance a financial writer on a great New York newspaper was discovered to have been a regular participant in the profits of a free-lance trader, without obligation except to publicize the stocks of the trader. Another witness admitted that his business was "financial publicity," and that his articles were published for the purpose of interesting the public in the stock in which he and those who employed him were interested, thereby causing the market value of the stock to increase; and for his work he was paid by calls and options. Still other cases were observed where persons were employed to broadcast over the radio, ostensibly as economists tendering gratuitious advice, but in reality as publicity agents of stock-exchange firms.

S.Rep. No. 792, 73d Cong., 2d Sess. 8 (1934). A more particular account of potential and actual abuses in the publication of market newsletters and impersonal investment recommendations is found in the Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, 88th Cong., 1st Sess., Pt. 1, 330-44, 359-69, 535-39 (1963). ("SEC Special Report"). *See also, e.g., SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963) (publisher's practice of buying securities for his own account shortly before recommending them in his newsletter); *Courtland v. Walston & Co.*, 340 F.Supp. 1076 (S.D.N.Y.1972) (investment adviser's practice of recommending stocks to his pri-



vate customers prior to making similar recommendations in his "influential and highly regarded weekly market letter"); *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) (financial columnist reported favorably on a stock after purchasing 5,000 shares at a discount).

The justification for government oversight of investment advisory publications is apparent. After the fact sanctions against offenders would likely prove inadequate. When an advisory service has improperly touted a stock and artificially inflated its price, the numerous investors who have relied on the recommendation and are hurt when the price of the stock subsequently collapses may be without redress. Assuming the publisher might be financially liable under the securities laws, *see Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir.1979), *but see Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979), he may be unable to make restitution for the losses he has caused. Investors may encounter difficult problems of proof or may be unaware of the source of their injury. While criminal sanctions are provided in section 217 of the Advisers Act, 15 U.S.C. § 80b-17 (1976), they may not serve as an effective deterrent, given their necessarily spotty enforcement.

The principal mode of regulation employed in the securities laws is one of prophylactic disclosure rather than restraint. In his letter to Congress recommending passage of the Securities Act of 1933, President Roosevelt disclaimed any attempt at substantive government evaluation of securities offered to the public. Rather, the purpose of the legislation was to add

> to the ancient rule of caveat emptor, the further doctrine "let the seller also beware." It puts the burden

> of telling the whole truth on the seller. It should give impetus to honest dealing in securities and thereby bring back public confidence.

President's Message to Congress of March 29, 1933, *reprinted in* H.R.Rep. No. 85, 73d Cong., 1st Sess. 1, 2 (1933). A similar observation has been made by the Supreme Court with regard to the Advisers Act. In common with the other securties laws,

> [a] fundamental purpose [of the Advisers Act] was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.

*SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186, 84 S.Ct. 275, 280, 11 L.Ed.2d 237 (1963). *See also* 2 L. Loss, Securities Regulation 1396 (1961).

The disclosure philosophy has been employed in several ways to combat abuses committed by those who provide publicity for securities or render investment advice. Section 17(b) of the Securities Act of 1933, 15 U.S.C. § 77q(b) (1976), makes it unlawful to give publicity to a security for consideration without fully disclosing the receipt and amount of such consideration. Section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), empowers the SEC to require investment advisers, including those in the business of pubishing advisory materials, to make and disseminate prescribed reports. Pursuant to this section the Commission has required every investment adviser whose registration is effective or pending to file Form ADV, containing detailed information on the adviser's background and expertise. Advisers Act Rules 204-1, 279.1, 17 C.F.R. §§ 275.204-1, 279.1 (1982). Rule 204-3, 17 C.F.R. § 275.204-3 (1982), requires



certain advisers to provide some of this information to their clients. In response to documented abusive practices in the advertising for investment advisory services, including those promoting subscription publications, *see* SEC Special Report at 367-69, the SEC promulgated Rule 206(4)-1, 17 C.F.R. § 275.206(4)-1 (1982), under the anti-fraud provisions of section 206 of the Advisers Act, 15 U.S.C. § 80b-6 (1976). Among the provisions of the Rule is one that requires any advertising that makes reference to a successful past recommendation to offer to disclose all other recommendations made by the adviser within the preceding year.

The securities laws are sprinkled with provisions providing for restraints on practices that present dangers despite the most full and candid disclosure. The SEC has the authority to deny or revoke the registration of broker-dealers, 15 U.S.C. § 78*o*(b) (1976), and it is uncontested that the Commission has similar authority under section 203 of the Advisers Act, 15 U.S.C. § 80b-3 (1976), with respect to investment advisers who render personal investment advice. The direct contact that these professionals have with clients and the control they may exercise over client funds justify strong sanctions in the way of prior restraints against those among them who have been guilty of misconduct.

The newsletter publisher, however, plays a role different from that of the broker-dealer or personal adviser, so that observations and procedures directed toward securities practitioners generally are not necessarily applicable to him. For example, in enacting the anti-fraud provisions of the Advisers Act Congress observed that the "occupations [of broker-dealers and advisers] involve similar delegations of trust and responsibility." S.Rep. No. 1760, 86th Cong.,

2d Sess., 1960 U.S.Code Cong. & Admin.News 3502, 3504. The analogy is apt for the personal adviser, but not for the editor of a market publication who has no direct person-to-person contact with his readers and to whom there is no delegation of authority.

In the Advisers Act the common grouping of personal and impersonal advisers need not imply that Congress intended that they be treated identically under all provisions or for all purposes. In particular, Congress may have assumed that disclosure of past misdeeds alone would be inadequate protection against an adviser who, through personal contact, could improperly dilute the force of such disclosure. The only effective protection would be a bar to the adviser's practice. But Congress might have concluded that disclosure was adequate in the case of an impersonal client who could more calmly weigh the gravity of the publisher's misdeeds against his advisory qualifications and in an unpressured atmosphere decide to accept or reject the publisher's services or recommendations.

Admittedly there is no suggestion on the face of the statute that persons whose only advisory activity is the publication of impersonal investment suggestions, reports, and analyses should be treated differently under section 203 from other persons within the definition of investment adviser contained in section 202. Nevertheless, this interpretation is suggested by constitutional considerations.

B. *First Amendment Considerations*

The constitutional protection afforded published investment advice may hinge on the characterization of this form of speech. The SEC has urged that it be classified as commercial speech, and thus subject to a greater degree of regulation and restraint than other publications. Even under the unfolding doctrines of commercial speech, however, restraint of subscription advisory material would pose serious constitutional questions.



The Supreme Court's most recent pronouncements in this area have set forth criteria under which commercial speech may be restrained. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980) provides a four-part test: 1) determine first whether the publication "concern[s] lawful activity and [is] not . . . misleading". If so the restraint will be upheld only if 2) "the asserted government interest is substantial"; 3) "the regulation directly advances the governmental interest asserted"; and 4) "it is not more extensive than is necessary to serve that interest."

The focus of this and other Supreme Court commercial speech cases has been on product and service advertising. In this regard the Court has noted that "the potential for deception and confusion is particularly strong in the context of advertising professional services." *In re R——— M. J* ——, 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982). The Court, nevertheless, adhered to the principle that "restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." *Id.* The remedy against the potential for misleading advertising "in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *Id.*, citing *Bates v. State Bar of Arizona,* 433 U.S. 350, 375, 97 S.Ct. 2691, 2704, 53 L.Ed.2d 810 (1977). These guidelines are presumably of general application in the commercial speech context.

Applying the Supreme Court's analysis, subscription advisory material is entitled to constitutional protection since it constitutes lawful activity and is not necessarily misleading. As indicated earlier, the government has a clear and substantial interest in preserving the integrity of the securities markets and preventing the demonstrated abuses that have attended dissemination of impersonal investment advice and analysis. It may be conceded that a regulatory regime under which a publication license could be denied those with a history of criminal fraudulent conduct would advance the government interest. Such individuals are reasonably suspect of a greater tendency to engage in abusive practices than are others whose records are free of the taint of trickery.

Nevertheless, publication restraint fails to meet the fourth criteria articulated in *Central Hudson Gas* for restricting commercial speech. Given the disclosure mechanisms available to the SEC to put subscribers on their guard against interested investment advice, the censorship that the SEC would impose on Lowe is more extreme than necessary to effectuate the congressional goal of a confident and informed investing public. *Cf. Friedman v. Rogers,* 440 U.S. 1, 11-13, 99 S.Ct. 887, 895-96, 59 L.Ed.2d 100 (1979) (upholding ban on trade names in the practice of optometry because trade names are subject to manipulation through use without explanation).

Prepublication restraints are ordinarily justifiable only where the non-protected character of the content is ascertainable with "relative certainty" prior to dissemination. *See* L. Tribe, American Constitutional Law 730 (1978). Even in the context of commercial speech speculative assess-



ments may not be relied upon to curb first amendment exercise where the less drastic alternative of disclosure exists.

While a commercial speech analysis demonstrates the constitutional infirmities of publication restraint in this case, the SEC's premise that investment advisory publications constitute commercial speech is itself questionable. The Supreme Court has defined commercial speech as "speech which 'does no more than propose a commercial transaction,' " *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976), *quoting Pittsburgh Press Co. v. Human Relations Commission,* 413 U.S. 376, 385, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). *See also Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 562, 100 S.Ct. 2343, 2349, 65 L.Ed. 2d 341 (1980). It has alternatively been described as "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas,* 447 U.S. at 561, 100 S.Ct. at 2349, *quoted in In Re R—— M. J——,* 455 U.S. 191, 204 n. 17, 102 S.Ct. 929, 938 n. 17, 71 L.Ed.2d 64 (1982). Despite the broader sounding reach of the latter articulation, the cases employing the commercial speech doctrine have uniformly dealt with product or service advertising. *See Ad World, Inc. v. Township of Doylestown,* 672 F.2d 1136, 1140 (3d Cir. 1982).

Investment advisory material disseminated to the public is not commercial advertising of a product or service. Such publications are not the words of a seller peddling his own wares or services, but those of an apparently detached observer commenting on the value of choses offered or held by others. To be sure the investment publisher has a financial motivation to disseminate his analyses and recommendations, but so may the literary publisher or political

pamphleteer. Their motivations differ in kind from the monetary incentives characteristic of the advertiser of a particular product. The difference reflects in part basic distinctions "between commercial price and product advertising, on the one hand, and ideological communication on the other." *Virginia State Board of Pharmacy,* 425 U.S. at 779, 96 S.Ct. at 1834 (Stewart, J., concurring).

Recommendation of particular securities is somewhat dissimilar from "[i]deological expression, be it oral, literary, pictorial, or theatrical, [that] is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man." *Id.* But there is no clearly defined perimeter that circumscribes the universe of ideological thought. Economic discussion addresses issues of public concern and qualifies as ideological debate. *See, e.g.,* P.A. Samuelson, Economics, *passim* (11th ed. 1980) (particularly chapter 42, "Winds of Change: Evolution of Economic Doctrine"); A. Alchian & W.R. Allen, Exchange and Production: Competition, Coordination and Control, Preface (2d ed. 1977); H.G. Manne, The Economics of Legal Relationships 1-3 (1975). The state of the nation's economy and finances is often an issue uppermost in the minds of voters, and politicians regularly point to the performance of the stock market as an index of public confidence in their office. There exists, moreover, no sharp demarcation in the range of economic observation that runs from comment on economic policy to prediction of the performance and recommendation of specific securities. Financial news and analysis is persistently flavored with projected consequences of political events and both may form the predicate for particular investment advice.

The content of the Lowe Investment and Financial Letter illustrates these points. In a typical issue, dated Decem-



ber 11, 1981, the publisher combines factual observations and speculative predictions on market behavior with recommendations on specific securities. The publisher also offers general comments and specific recommendations on the gold and silver markets. Among the observations prefacing advice on bullion investment is a prediction of "increased inflation, worldwide economic havoc, and greatly increased worldwide political turmoil; and in fact, even a world war or major war somewhere . . . which will be fuel in gold's price rise." *Id.* at 7. Attempting to precipitate out the various types of speech present in this mixture is an exercise of doubtful constitutional utility. *See Ad World, Inc. v. Township of Doylestown,* 672 F.2d 1136 (3rd Cir.1982) (tabloid almost entirely devoted to advertising with small amounts of consumer and community information entitled to first amendment protection).

It may be true "that the activities involved in giving commercial investment advice are [not] entitled to the identical constitutional protection provided for certain forms of social, political, or religious expression." *SEC v. Wall Street Transcript Corp.,* 422 F.2d 1371, 1379 (2d Cir.), *cert. denied,* 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970). "[R]estrictions [that] would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates to public office" may be permissible with regard to other forms of non-commercial speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S 748, 778 n. 3, 96 S.Ct. 1817, 1833 n. 3, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring) (referring to labor relations). *See Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 70-71, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976) (plurality opinion). *Cf.*

Note, Peaceful Labor Picketing and the First Amendment, 82 Colum.L.Rev. 1469 (1982). Nevertheless, the combination of fact, economic and political analyses, conjecture, and recommendation characteristic of investment newsletters places them outside the rubric of commercial speech and raises unanswered questions concerning the conditions, if any, under which an absolute restraint may constitutionally be imposed upon them. *Cf. Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

C. *Construction of Advisers Act*

One approach to the constitutional difficulties posed by the SEC's interpretation of the Investment Advisers Act would be to declare the Act unconstitutional as it applies to investment advisory publishers. Such an approach would seriously impede the regulation of securities markets. Its effect on investors as well as those in the securities business might be highly damaging. It seems doubtful that Congress or the SEC would welcome such a result. To the contrary, Congress has apparently encouraged a flexible approach in the interpretation and execution of the Advisers Act so as to advance the public good. To this end it has provided that

> [t]he Commission, by rules and regulations . . . may conditionally or unconditionally exempt . . . any class . . . of persons . . . from any provision [of the Act] . . . to the extent that such exemption is necessary or appropriate in the public interest . . . .



Section 206A of the Advisers Act, 15 U.S.C. § 80b-6a (1976). A similar liberality is called for in the construction of the Advisers Act to preserve its constitutionality and basic design.

Rather than adopt an interpretation that "might collide with the guarantees of the First Amendment," *National Labor Relations Board v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits),* 377 U.S. 58, 63, 84 S.Ct. 1063, 1066, 12 L.Ed.2d 129 (1964), the Act should be construed to steer clear of possible infringements on freedom of the press. As the Supreme Court has recently reminded us,

> We consider the statutory question because of the " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.' " *Lorillard v. Pons,* 434 U.S. 575, 577 [98 S.Ct. 866, 868, 55 L.Ed.2d 40] (1978), *quoting Crowell v. Benson,* 285 U.S. 22, 62 [52 S.Ct. 285, 296, 76 L.Ed 598] (1932).

*United States v. Security Industrial Bank,* —— U.S. ——, ——, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982). *See, e.g., United States v. Security Industrial Bank,* (giving a prospective reach to certain provisions of the Bankruptcy Act to avoid questions under the fifth amendment takings clause); *Lorillard v. Pons,* (reading the Age Discrimination in Employment Act to permit jury trial on actions for lost wages rather than reach a seventh amendment challenge); *Tree Fruits* (permitting secondary consumer picketing under the National Labor Relations Act); *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979) (interpreting the National Labor Relations Act as not granting the National

Labor Relations Board jurisdiction over lay faculty members of church-operated schools).

Such concerns did not control in *Savage v. Commodity Futures Trading Commission,* 548 F.2d 192 (7th Cir.1977), a case presenting a strong analogy to the one before us. The Commodity Futures Trading Commission had denied plaintiff's application for registration as a "commodity trading advisor," pursuant to 7 U.S.C. §§ 6n, 12a (1976), because of his prior conviction for securities and mail fraud. Like its counterpart in the Advisers Act, the Commodity Futures Trading Commission Act defines an advisor to include one "who for compensation and profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities." 7 U.S.C. § 2 (1976). Prior to the enactment of the Act, the plaintiff had published a weekly subscription newsletter giving his views on the commodity market. He challenged the Commission's denial of his registration as a violation of his first amendment rights. The Seventh Circuit panel brushed aside the first amendment challenge, categorizing the speech as commercial and declaring that the first amendment "does not remove a business engaged in communication of information from general laws regulating business practices," 548 F.2d at 197. The court made reference to Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), that adduced the securities laws as one example of the proposition that "the right to communicate information of public interest is not 'unconditional'." *Id.* at 150, 87 S.Ct. at 1989.

The *Savage* court did not have the benefit of the Supreme Court's subsequent commercial speech cases suggesting that



the commercial speech doctrine is limited to advertising. The cited observations of Justice Harlan in *Curtis Publishing* must be considered in context. The question in that case was not one of prior restraint, but rather of news media liability in damages for inaccurate and defamatory reporting. Federal securities regulation was referred to in a list that included mail fraud and common-law actions of deceit and misrepresentation. Justice Harlan demonstrated that the law countenanced the imposition of liability and sanctions on those who had disseminated to the public damagingly false information. He did not imply that in a business context the government may restrict in advance the public speech of certain individuals out of a fear that what they would say in the future might prove deceptive. The authority to impose blanket suppression through prior restraint on would-be publishers of impersonal market information thus has not, so far as we have been able to determine, been recognized by the Supreme Court.

The Advisers Act may readily accommodate the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960) (footnote omitted). The narrower means provided for in the Act to protect the public against placing its confidence in investment publishers unworthy of its trust is detailed and particular disclosure. *Cf. Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299, 102 S.Ct. 434, 439, 70 L.Ed.2d 492 (1982) (instead of a limitation on campaign contributions which restrains first amendment

freedoms of association and expression "[t]he integrity of the political system will be adequately protected" by public disclosure of contributions).

1. *Denial of Registration to Publishers*

The Act is construed to require registration of publishers of impersonal investment material, but is not interpreted to empower the Commission to deny registration to such publishers, qua publishers, nor to revoke their registration previously granted. As the Second Circuit observed in *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1380 n. 13 (2d Cir.), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970), "even if a newspaper is engaged in commercial practices which may be regulated, the Act grants no authority for review or censorship by the Commission of investment advisory material prior to its publication."

Section 202(a)(11) of the Act, 15 U.S.C. § 80b-2(a)(11) (1976) combines in its definition both the personal and impersonal adviser. Nevertheless, the Act is of limited applicability to advisers and their associates as publishers of impersonal investment advice for general or subscription distribution in section 203(c)(2)(B), 15 U.S.C. § 80b-3(c)(2)(B), insofar as it speaks of denial of registration; the last sentence of section 203(c)(2), 15 U.S.C. § 80b-3(c)(2); section 203(e), 15 U.S.C. § 80b-3(e), insofar as it speaks of suspension or revocation of registration; and section 203(f), 15 U.S.C. § 80b-3(f), insofar as it speaks of suspension or bar from association with an investment adviser. These provisions may only be invoked for failure to make the required disclosures. When a publisher who has been denied registration or against whom sanctions have been invoked fully complies with the record, reporting and disclosure requirements under the Act, he must be allowed to register for the purpose of publishing and to publish.



The defendants, whose registration has been revoked by the SEC for all purposes on May 11, 1981, cannot be cited for or enjoined from a violation of the registration provisions of the Advisers Act insofar as their activities are limited to publishing. So long as the defendants stand ready to submit to registration and provide all information that is now or may in the future be properly required by the SEC pursuant to sections 203(c)(1) and 204 of the Advisers Act, 15 U.S.C. §§ 80b-3(c)(1), 80b-4 (1976), but are denied registration by the Commission, they may continue to publish their market newsletters and news services.

In the publisher's context, registration constitutes no more than a feature of the disclosure mechanism. Although section 203(c)(2) of the Act, 15 U.S.C. § 80b-3(c)(2) (1976), allows the Commission 45 days to make a determination on an application for registration, with an extension of up to 90 days if proceedings are held, this does not constitute an impermissible period of restraint. Unlike certain types of political speech where the timing of public dissemination may be of the essence, *cf. Greenberg v. Bolger*, 497 F.Supp. 756 (E.D.N.Y.1980), the date on which an investment publisher begins to offer his services to the public is not critical. Provided the Commission uses the allowed time in good faith to expeditiously ascertain the completeness and accuracy of the proffered disclosure, the attendant delay is justified by the substantial public interest served by truthful and honest reporting by investment advisers. *See* L. Tribe, Constitutional Law 730-31 (1978).

2. *Failure to Reveal Denial of Registration and Convictions*

The SEC charges defendants with a violation of the anti-fraud provisions of the Advisers Act, section 206, 15 U.S.C. § 80b-6 (1976). The contention is that the defendants' solicitation and sale of investment advisory publications without disclosure to readers and potential readers of the SEC's May 11, 1981 order against Lowe and Lowe Management Corporation and Lowe's criminal convictions constituted fraud.

The SEC's authority to require of investment advisers on-going disclosure derives from section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976). This section does not authorize the SEC to prescribe ad hoc disclosure requirements. Section 204 explicitly provides that any record and report obligation imposed by the SEC must be prescribed by rule; disclosure requirements must be of general application. Because there is no rule presently in force that would require a subscription market letter publisher to disclose to its readers the past misconduct or criminality of its owners, employees or associates, the defendants cannot be found to have violated any reporting requirements. Advisers Act Rule 204-3, 17 C.F.R. § 275.204-3 (1982), which requires certain disclosure to advisory clients, conspicuously fails to require disclosure of Part I of Form ADV, containing a recital of any administrative or judicial determinations of misconduct against the adviser. It would be patently unfair to hold defendants accountable under the anti-fraud provisions of section 206 for failure to disclose when the reporting rules are silent on any such requirement and may even imply the absence of such a requirement.



Nothing presented to the court in this case suggests that narrowly drawn reasonable rules for divulgence in the publication itself of criminal activities or of deregistration of principals of a publisher would be invalid. The "fact that a demand for disclosure may have some deterrent effect upon speech does not automatically invalidate it." *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1380 (2d Cir.), *cert. denied*, 398 U.S. 958, 90 S.Ct. 2170, 26 L.Ed.2d 542 (1970). *See Lewis Publishing Co. v. Morgan*, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190 (1913) (validating legislation now contained in 39 U.S.C. § 3685 (1976), requiring a periodical publication having reduced rate mailing privileges to publish annually the identities of its owners, editors, publishers and creditors). *See also Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (ordinance requiring publicly distributed handbills to contain a printed identification of authorship not narrowly drawn to effect the declared aims, so that the Court was not required to reach the question of whether such a disclosure requirement could ever be constitutional); L. Tribe, Constitutional Law 798-99 (1978). *Cf. Electric Bond and Share Co. v. SEC*, 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936 (1938) (upholding the registration and disclosure provisions of the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1976)); *Oklahoma-Texas Trust v. SEC*, 100 F.2d 888 (10th Cir.1939) (ruling that Congress may require securities registration as a condition precedent to the use of the mails and the facilities of interstate commerce); *Buckley v. Valeo*, 424 U.S. 1, 60-85, 96 S.Ct. 612, 654-66, 46 L.Ed.2d 659 (1976) (approving the reporting and disclosure requirements of the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.* (1976)); *United States v. Harriss*, 347 U.S.

612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (upholding the reporting provisions of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.* (1976), against first amendment challenge). The government has an added interest in publicly disseminated disclosure when speakers avail themselves of the mails as do investment advisory publishers. *See Lewis Publishing Co. v. Morgan, supra.* This interest is expressed on the face of section 204 of the Advisers Act, 15 U.S.C. § 80b-4 (1976), which imposes record and reporting obligations on "[e]very investment adviser *who makes use of the mails* or of any means or instrumentality of interstate commerce." (Emphasis added.)

*Conclusion*

The Advisers Act requires registration of investment advisory publishers. It does not authorize denial of registration to these persons as publishers because of past misconduct so long as they make the disclosure provided for in the Act and rules. Because the defendants in this case were effectively denied registration as publishers, they will not be enjoined from publishing their newsletters and other impersonal services. The Commission's order of May 11, 1981 remains undisturbed insofar as it applies to any investment advisory activity other than the publication of impersonal investment advisory material.

The offer of defendants to their subscribers to provide current information by telephone goes beyond impersonal communication. It creates dangers of personal advice. The SEC may reasonably deny this right to publishers barred from giving personal advice.

Defendants did not violate the anti-fraud provisions of the Advisers Act by failing to disclose to their subscribers



Lowe's criminal convictions and the Commission's order of May 11, 1981 revoking the registration of Lowe Management Corporation and barring Lowe from association with any investment adviser. There presently exists no obligation under the securities laws and rules to make such disclosure.

The petition for a temporary and permanent injunction pursuant to section 209(e) of the Advisers Act, 15 U.S.C. § 80b-9(e) (1976), and the petition for an equitable order of disgorgement of monies received in the course of the business of impersonal investment advisory publication are denied. An injunction will issue denying defendants permission to give securities information to their subscribers or potential subscribers directly or indirectly by telephone, individual letter or in person.

So ordered.

**§ 80b-2. Definitions**

(a) When used in this subchapter, unless the context otherwise requires—

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(11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956 which is not an investment company; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or securities issued or guaranteed by corporations in which the United States has a direct or indirect interest which shall have been designated by the Secretary of the Treasury, pursuant to section 3(a)(12) of the Securities Exchange Act of 1934, as exempted securities for the purposes of that Act; or (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

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**§ 80b-3. Registration of investment advisers**

**Necessity of registration**

(a) Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

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**Procedure for registration; filing of application; effective date of registration; amendment of registration**

(c)(1) An investment adviser, or any person who presently contemplates becoming an investment adviser, may be registered by filing with the Commission an application for registration in such form and containing such of the following information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the name and form of organization under which the investment adviser engages or intends to engage in business; the name of the State or other sovereign power under which such investment adviser is organized; the location of his or its principal business office and branch offices, if any; the names and addresses of his or its partners, officers, directors, and persons performing similar functions or, if such an investment advisor be an individual, of such individual; and the number of his or its employees;

(B) the education, the business affiliations for the past ten years, and the present business affiliations of such investment adviser and of his or its partners, officers, directors, and persons performing similar functions and of any controlling person thereof;

(C) the nature of the business of such investment adviser, including the manner of giving advice and rendering analyses or reports;

(D) a balance sheet certified by an independent public accountant and other financial statements (which shall, as the Commission specifies, be certified);

(E) the nature and scope of the authority of such investment adviser with respect to clients' funds and accounts;

(F) the basis or bases upon which such investment adviser is compensated;

(G) whether such investment adviser, or any person associated with such investment adviser, is subject to any disqualification which would be a basis for denial, suspension, or revocation of registration of such investment adviser under the provisions of subsection (e) of this section; and

(H) a statement as to whether the principal business of such investment adviser consists or is to consist of acting as investment adviser and a statement as to whether a substantial part of the business of such investment adviser, consists or is to consist of rendering investment supervisory services.

(2) Within forty-five days of the date of the filing of such application (or within such longer period as to which the applicant consents) the Commission shall—

(A) by order grant such registration; or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred twenty days of the date of



the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if the Commission finds that the requirements of this section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under subsection (e) of this section.

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**Censure, denial, or suspension of registration; notice and hearing**

(e) The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this subchapter, or in any proceeding before the Commission with respect to registration, any statement which was at the time and

in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25 or 47 of Title 18.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, or



the rules or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

(5) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, subchapter I of this chapter, this subchapter, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this paragraph (5) no person shall be deemed to have failed reasonably to supervise any person, if—

(A) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(B) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

(6) is subject to an order of the Commission entered pursuant to subsection (f) of this section barring or suspending the right of such person to be associated with an investment adviser which order is in effect with respect to such person.

**Bar or suspension from association with investment adviser; notice and hearing**

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (c) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e). It shall be unlawful for any person as to whom such an order suspending or barring him from being associated with an investment adviser is in effect willfully to become, or to be, associated with an investment adviser without the consent of the Commission, and it shall be unlawful for any investment adviser to permit such a person to become, or remain, a person associated with him without the consent of the Commission, if such investment adviser knew, or in the exercise of reasonable care, should have known, of such order.

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**§ 80b-9. Enforcement of Subchapter**

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**Action for injunction**

(e) Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criimnal proceedings under this subchapter.